

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   THOMAS VAN ORDEN,                                 :  
4                                 Petitioner                                 :  
5                 v.   :   No. 03-1500  
6   RICK PERRY, IN HIS OFFICIAL                         :  
7   CAPACITY AS GOVERNOR OF                                 :  
8   TEXAS AND CHAIRMAN, STATE                                 :  
9   PRESERVATION BOARD, ET AL.                                 :

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11   Washington, D.C.

12   Wednesday, March 2, 2005

13                 The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United  
15   States at 10:06 a.m.

16   APPEARANCES:

17   ERWIN CHERMERINSKY, ESQ., Durham, N.C.; on behalf of  
18                 the Petitioner.

19   GREG ABBOTT, ESQ., Attorney General, Austin, Tex.; on  
20                 behalf of Respondents.

21   PAUL D. CLEMENT, ESQ., Acting Solicitor General,  
22                 Department of Justice, Washington, D.C.; on  
23                 behalf of United States, as amicus curiae,  
24                 supporting Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 JUSTICE STEVENS: We'll now hear argument  
4 in Van Orden against Perry.

5 Mr. Chemerinsky.

6 ORAL ARGUMENT OF ERWIN CHEMERINSKY

7 ON BEHALF OF PETITIONER

8 MR. CHEMERINSKY: Good morning, Justice  
9 Stevens, and may it please the Court:

10 On the grounds of the Texas State Capitol,  
11 there is one evident religious symbol that conveys a  
12 powerful religious message that there is a theistic  
13 God and that God has dictated rules for behavior.

14 Of course, the government may put  
15 religious symbols on its property, including the Ten  
16 Commandments, but must do so in a way that does not  
17 endorse religion or a particular religion, but does  
18 not have the purpose of advancing religion, but does  
19 not favor any particular religion.

20 JUSTICE SCALIA: Mr. Chemerinsky, I  
21 suppose that opening statement suggests that you  
22 think that Thanksgiving proclamations are also  
23 unconstitutional, which were recommended by the very  
24 first Congress, the same Congress that proposed the  
25 First Amendment.

1                   MR. CHEMERINSKY: No, Your Honor, I would  
2    --

3                   JUSTICE SCALIA: They also refer to one  
4    God, to a theistic ruler of the universe.

5                   MR. CHEMERINSKY: No, Your Honor, I think  
6    the Thanksgiving proclamations would be  
7    constitutional. I think it's analogous to the  
8    legislative prayers that this Court upheld in  
9    Chambers v. Marsh. I think it's very different than  
10   this Ten Commandments monument.

11                  JUSTICE SCALIA: All right. But then you  
12   have to narrow your opening statement and say that  
13   certainly the State can acknowledge the existence of  
14   a unitary God without offending the Establishment  
15   Clause.

16                  MR. CHEMERINSKY: Yes, Your Honor, but it  
17   all depends on how it is done. Here the way in which  
18   it is done is the most powerful and profound  
19   religious message that this Court has ever considered  
20   on government property. Here you have a monument  
21   that proclaims not only there is a God, but God has  
22   dictated rules of behavior for those who follow him  
23   or her.

24                  JUSTICE KENNEDY: I don't know whether  
25   that's any more profound or ultra-religious,

1 super-religious than the prayer that the chaplain  
2 gives every day in the House.

3 MR. CHEMERINSKY: Your Honor, there is a  
4 difference between a prayer that a chaplain gives --  
5 in *Chambers v. Marsh*, this Court emphasized that the  
6 prayer by the chaplain was a nonsectarian prayer.  
7 This is very much sectarian. This proclaims that  
8 there is a God. It proclaims --

9 JUSTICE KENNEDY: Well, I mean, I haven't  
10 read the prayer. I would be surprised if I went  
11 through all the prayers and there was no mention,  
12 direct or indirect, of the Ten Commandments or a  
13 couple of them.

14 MR. CHEMERINSKY: Your Honor, I would be  
15 surprised because here, if you look at these  
16 commandments, it's that God has claimed that he is  
17 the only God, prohibiting idolatry, prohibiting  
18 graven images, prohibiting taking the name of the  
19 Lord and God in vain. Requiring observing of the  
20 sabbath. This is God dictating to God's follower's  
21 rules for behavior.

22 JUSTICE BREYER: Is there any other -- I  
23 mean, you can continue if you want, but one  
24 difference which I've written down is you say that  
25 the difference between this and the prayer is that

1 this is more profoundly religious. Is there any  
2 other difference, in your opinion?

3 MR. CHEMERINSKY: No. I think the key  
4 difference is --

5 JUSTICE BREYER: That's the difference?  
6 So if I happen to read these prayers in the Congress  
7 and I came to the conclusion that in terms of a  
8 religious message, I actually thought the prayers had  
9 the more religious message, then I should vote  
10 against you.

11 MR. CHEMERINSKY: No, Your Honor. There  
12 are, of course, other differences. As I said to  
13 Justice Scalia earlier, with regard to legislative  
14 prayer in Chambers versus Marsh, this Court said that  
15 there was a history going back to the very first  
16 Congress that allowed there to be those kinds of  
17 religious invocations. Ten Commandments monuments  
18 standing by themselves, as they do here, certainly  
19 are not of that historic origin.

20 JUSTICE O'CONNOR: How about if they're  
21 packaged in a museum-like setting and there is some  
22 interest on the part of the State in preserving  
23 something.

24 MR. CHEMERINSKY: Yes, Your Honor.

25 JUSTICE O'CONNOR: And displaying a whole

1 variety of things?

2 MR. CHEMERINSKY: Of course, there can be  
3 Ten Commandments or any religious works as part of a  
4 museum setting. This isn't a museum setting, Your  
5 Honor. Every monument on the Texas --

6 JUSTICE O'CONNOR: Is this a kind of a  
7 park? What do we regard this space as? What is it?  
8 Is it a park-like setting?

9 MR. CHEMERINSKY: It is a park-like  
10 setting. It is the acres of the State Capitol  
11 grounds. Every monument on the State Capitol grounds  
12 is there because the State legislature wanted to  
13 convey a particular message. It is a felony in  
14 Texas, an impeachable offense to put anything on the  
15 Capitol grounds without the approval of the  
16 legislature.

17 Most of the monuments are there to honor  
18 war veterans. This is the only religious message  
19 anyone on the Capitol grounds. And by itself --

20 JUSTICE O'CONNOR: Well, would it be all  
21 right, in your view, if they put several others up  
22 for different religions? Then is it going to be  
23 okay?

24 MR. CHEMERINSKY: If the clear purpose and  
25 message was to honor the diversity of religions in

1 Texas, it would then be permissible. If it were a  
2 series of displays like that frieze, the fifteen  
3 different --

4 JUSTICE O'CONNOR: You don't object to  
5 that?

6 MR. CHEMERINSKY: Quite the contrary, I  
7 think it's a --

8 JUSTICE O'CONNOR: Or the depiction on the  
9 door of the Court?

10 MR. CHEMERINSKY: Quite the contrary.  
11 This is exactly how the State may display the Ten  
12 Commandments.

13 JUSTICE SCALIA: But the prayers in  
14 Congress doesn't do that and our Thanksgiving  
15 proclamations don't do that. They invoke a God, a  
16 unitary God, and that's contrary to the dictates of  
17 some religions that believe that there are a lot of  
18 gods.

19 MR. CHEMERINSKY: Yes, Your Honor, there  
20 is --

21 UNKNOWN SPEAKER: We don't pray to gods,  
22 the prayers are always to God. You know, I don't see  
23 why the one is good and the other is bad. It's no  
24 answer to say, well, you know, the former has been  
25 around for a long time. Well, it has but it suggests



1 what the framers and what our society for several  
2 hundred years has believed the Establishment Clause  
3 means.

4 And it does not -- it is not too sectarian  
5 if it invokes a unitary God. Now, you're saying it  
6 becomes too sectarian when it invokes the Ten  
7 Commandments.

8 MR. CHEMERINSKY: No, Your Honor. I'm  
9 saying several things. As I said earlier, first,  
10 this Court in *Chambers v. Marsh* said that there was a  
11 unique history to legislative prayers. There isn't a  
12 similar history here.

13 JUSTICE GINSBURG: Mr. Chemerinsky, too,  
14 doesn't the venue count? After all, we have had the  
15 question of prayer in schools, and the Court has said  
16 that that was not all right. Prayer in the  
17 legislature was distinguished. So it's not just  
18 prayer anywhere that the government wants to have if  
19 is okay.

20 MR. CHEMERINSKY: Of course, Justice  
21 Ginsburg, the venue counts. And here the venue is  
22 very important. It is the corner between the Texas  
23 State Capitol and the Texas Supreme Court.

24 And in that way, this monument standing  
25 alone does convey the government's endorsement for

1 religion.

2 JUSTICE O'CONNOR: Okay. But if the  
3 legislature itself can have its sessions opened with  
4 a prayer, can the legislature itself want to have the  
5 Ten Commandments posted within the legislative halls?

6 NR. CHEMERINSKY: Your Honor, I think  
7 there is a very different message that's conveyed.

8 JUSTICE O'CONNOR: Can it do that?

9 MR. CHEMERINSKY: No, Your Honor, it can't  
10 post the Ten Commandments by itself in its  
11 legislative halls because that would then be the  
12 government endorsing expression for support for that  
13 message.

14 It cannot be, Your Honor, that just  
15 because there is a legislative prayer, that any  
16 religious message anywhere on government property  
17 would then be permissible. As Justice Kennedy has  
18 said in his opinion for --

19 JUSTICE O'CONNOR: But it's so hard to  
20 draw that line. If the legislature can open its own  
21 sessions attended by the public with a prayer, you  
22 say it cannot, in the same building, display the Ten  
23 Commandments.

24 MR. CHEMERINSKY: That's right, because  
25 the message from the government is quite different.

1 The message with legislative prayers, as this Court  
2 found in Chambers v. Marsh, is a recognition of a  
3 long historical practice.

4 But when it comes to the Ten Commandments,  
5 it really is different than even a legislative  
6 prayer. This declares not only there is a God, but  
7 that God has proclaimed rules for behavior. The Ten  
8 Commandments come from sacred texts.

9 As Justice Kennedy said in his opinion of  
10 County of Allegheny, certainly a city council could  
11 not put atop the city hall building a large Latin  
12 cross, even if that city council begins every day  
13 with a prayer.

14 It cannot be, though, just because some  
15 religious messages are aloud, like a prayer, that  
16 everything then becomes permissible.

17 JUSTICE KENNEDY: Well, you know, in the  
18 First Amendment speech area, we're very, very strict.  
19 A moment's delay in publication is a constitutional  
20 crisis. And I'm not sure that we should carry that  
21 over to this area, where there is this obsessive  
22 concern with any mention of religion. That seems to  
23 me to show a hostility to religion. I just don't see  
24 a balanced dialogue in our cases or in these kinds of  
25 arguments.

1 MR. CHEMERINSKY: Your Honor, I don't  
2 believe there should be an obsessive concern with  
3 religion. If the Ten Commandments are displayed as  
4 part of an overall display of law givers, like that  
5 frieze, it's permissible. But when you put sacred  
6 texts somewhere on government property, then the  
7 message is that the government is endorsing --

8 JUSTICE KENNEDY: This is a classic avert  
9 your eyes. If an atheist walked by, he can avert his  
10 eyes, he can think about something else.

11 MR. CHEMERINSKY: I don't think so, Your  
12 Honor. This Court has said the key is that the  
13 government can't endorse religion, in a way that  
14 makes some feel like insiders and some like  
15 outsiders.

16 Imagine somebody who is Muslim or Buddhist  
17 or Hindu --

18 JUSTICE STEVENS: May I ask you this  
19 question. Supposing -- I recently read a case from  
20 the Seventh Circuit on what they did in Lacrosse,  
21 Wisconsin. And as we all know, this organization has  
22 donated Ten Commandments monuments all over the  
23 country. And what they did there is they sold the  
24 parcel back to the Eagles, their name, and put up a  
25 sign which read, this property is not owned or

1 maintained by the City of Lacrosse, nor does the city  
2 endorse the religious expression thereon.

3 Now, my question to you is, if there were  
4 a similar disclaimer on this monument, would that be  
5 an adequate remedy, in your view?

6 MR. CHEMERINSKY: It would be a harder  
7 case, but I don't think it would be an adequate  
8 remedy. And the reason is the city cannot put a  
9 religious symbol standing alone on government  
10 property just through disclaimer.

11 That's exactly what County of Allegheny  
12 was. There the nativity scene in the courthouse had  
13 a plaque saying it was donated by others, but that  
14 can't excuse it because otherwise the city could put  
15 the large Latin cross just with a disclaimer.

16 JUSTICE STEVENS: But if the test is  
17 whether the reasonable observer would think that the  
18 government is endorsing the religious message,  
19 wouldn't the disclaimer make it clear to the  
20 reasonable observer the government was not endorsing  
21 the message?

22 MR. CHEMERINSKY: I think the disclaimer  
23 would make it a harder case, but I think when you're  
24 dealing with the ground in a Texas State Capitol and  
25 the Texas Supreme Court, that placement, when you're

1 dealing with the Ten Commandments, sacred texts, I  
2 still think that the message the reasonable observer  
3 would be that this is the government endorsing  
4 religion.

5 JUSTICE O'CONNOR: At some point, would  
6 the State's interest in preserving old objects  
7 overcome the objection constitutionally?

8 MR. CHEMERINSKY: Yes, at some point, it  
9 could where it was clear to the reasonable observer  
10 that it was there because it was an old object.

11 JUSTICE O'CONNOR: How did this monument  
12 get there? Was it in -- is it true that it was put  
13 in as a result of promoting a movie about the Ten  
14 Commandments?

15 MR. CHEMERINSKY: The record is unclear as  
16 to that. There are certainly many indications in the  
17 popular press that Cecil B. DeMille together with his  
18 movie, The Ten Commandments, worked with the Friends  
19 of Eagles to have these monuments put around the  
20 country.

21 But there is nothing in the legislative  
22 history that links this particular monument to that.

23 JUSTICE GINSBURG: Isn't the display on  
24 the tablets on the top before you get to the text,  
25 before you get to, I am the Lord, thy God. I thought

1     that those were replicas of what was in the film.

2                 MR. CHEMERINSKY: I don't know that, Your  
3     Honor. I've tried to find out what that text is. It  
4     is not in Hebrew. It is not in a script that anyone  
5     was able to recognize. But it is important to notice  
6     that if you look at the entire monument, in addition  
7     to the Ten Commandments, there is also a Latin symbol  
8     of Christ, there is also Jewish Stars of David.

9                 And as I was saying in response to Justice  
10    Kennedy's question, imagine the Muslim or the  
11    Buddhist who walks into the State Supreme Court to  
12    have his or her case heard. That person will see  
13    this monument and realize it's not his or her  
14    government.

15                JUSTICE SCALIA: I thought Muslims accept  
16    the Ten Commandments.

17                MR. CHEMERINSKY: No, Your Honor, the  
18    Muslims do not accept the sacred nature of the Ten  
19    Commandments, nor do Hindus, or those who believe in  
20    many gods, nor of course, do atheists.

21                And for that matter, Your Honor, if a  
22    Jewish individual would walk by this Ten  
23    Commandments, and see that the first commandment  
24    isn't the Jewish version, I am the Lord, thy God,  
25    took you out of Egypt, out of slavery, would realize

1 it's not his or her government either.

2 JUSTICE SCALIA: You know, I think  
3 probably 90 percent of the American people believe in  
4 the Ten Commandments, and I'll bet you that 85  
5 percent of them couldn't tell you what the ten are.

6 (Laughter.)

7 JUSTICE SCALIA: And when somebody goes by  
8 that monument, I don't think they're studying each  
9 one of the commandments. It's a symbol of the fact  
10 that government comes -- derives its authority from  
11 God. And that is, it seems to me, an appropriate  
12 symbol to be on State grounds.

13 MR. CHERMERINSKY: I disagree, Your Honor.  
14 For the State to put that symbol between its State  
15 Capitol and the State Supreme Court is to convey a  
16 profound religious message. If you're just saying,  
17 now, this isn't there for its secular reason. If  
18 someone were to read this monument, one sees that it  
19 emphasizes its religious content.

20 JUSTICE SCALIA: It is a profound  
21 religious message, but it's a profound religious  
22 message believed in by the vast majority of the  
23 American people, just as belief in monotheism is  
24 shared by a vast majority of the American people.

25 And our traditions show that there is



1 nothing wrong with the government reflecting that. I  
2 mean, we're a tolerant society religiously, but just  
3 as the majority has to be tolerant of minority views  
4 in matters of religion, it seems to me the minority  
5 has to be tolerant of the majority's ability to  
6 express its belief that government comes from God,  
7 which is what this is about.

8 As Justice Kennedy said, turn your eyes  
9 away if it's such a big deal to you.

10 MR. CHEMERINSKY: I disagree, Your Honor.  
11 Because this Court has said that above all, the  
12 government can't make some feel like they're insiders  
13 and some like outsiders. Even if they're the  
14 majority religion --

15 JUSTICE KENNEDY: Well, suppose a  
16 non-Christian, say a Muslim, comes before a judge who  
17 has very strong Christian beliefs, a very religious  
18 person. Does he feel like an outsider? And to  
19 require that we pretend that there is no religious  
20 motivation, no deep religious conviction on the part  
21 of many of our public officials seems to me to be a  
22 hostility toward religion.

23 MR. CHEMERINSKY: No, Your Honor. Imagine  
24 that judge put the Ten Commandments right above his  
25 or her bench. That would make some individuals feel

1 like outsiders. Of course, many judges have  
2 religious beliefs, but they can't have the religious  
3 beliefs above them.

4 And Your Honor, that's not hostility to  
5 religion. As this Court said in County of Allegheny,  
6 excluding religious symbols like the nativity scene,  
7 when displayed by itself, is not hostility to  
8 religion.

9 Last year in Locke v. Davie, this Court  
10 said that to deny funding through the State of  
11 Washington for scholarships was not hostility to  
12 religion. Enforcing the Establishment Clause is not  
13 about hostility to religion. It is about making sure  
14 that every person who walks into that courtroom can  
15 feel that it's his or her government.

16 JUSTICE BREYER: That's an important point  
17 to me, but I don't see any way to get there in these  
18 difficult cases without making a practical judgment  
19 about whether that's really so.

20 And the reason I say that, I start with  
21 Goldberg's opinion with Harlan in Schempp. And I  
22 know there are a lot of others, but I don't know if  
23 we've found a satisfactory test. And the point that  
24 they make is the government should be noninvolved  
25 with the religious, and it can't favor one over the

1 other.

2 But at the same time, we are a religious  
3 nation, where most people do believe in God and most  
4 of our institutions flow from the religious nature of  
5 our people. The City on the Hill, proclaim liberty  
6 throughout the land. All of those are religious.

7 So how can the government, without what  
8 they call the pervasive and brooding commitment to  
9 secularism, which they think would be wrong, become  
10 necessarily involved because of our traditions, but  
11 not go too far?

12 Now, I come to the conclusion very  
13 tentatively, there is no way to do it other than look  
14 at the divisive quality of the individual display  
15 case by case. And when I do that, I don't find much  
16 divisiveness here.

17 Now, I'm exposing the whole thing not  
18 because I'm accepting it, but I would love to hear  
19 what you think.

20 MR. CHEMERINSKY: Yes, Your Honor, I think  
21 that the test that this Court has formulated do draw  
22 those lines. With regard to your point about  
23 divisiveness, the Ten Commandments is enormously  
24 divisive right now. I don't think we can ignore the  
25 social reality.

1           The chief justice of the Alabama Supreme  
2 Court resigned, there are crowds outside today. I  
3 got hate messages this week, not because people care  
4 about the Ten Commandments as a secular document, but  
5 people care about the Ten Commandments because it's a  
6 profound religious message.

7           And many want that religious message on  
8 government property. And I'm saying the government  
9 can put the Ten Commandments there as part of an  
10 overall display of law givers, because, Justice  
11 O'Connor, it's an overall display about diversity of  
12 religion.

13           But when the Ten Commandments sits by  
14 itself it is, to use your word right now, enormously  
15 divisive. And that's why, from that criteria, it  
16 does violate the Establishment Clause.

17           JUSTICE SCALIA: What about the opening of  
18 this Court's session today, in a manner that has been  
19 used since John Marshall, is that divisive because  
20 there are a lot of people who don't believe in God.

21           MR. CHEMERINSKY: Because Your Honor, I  
22 think that you have to distinguish between minimal  
23 religious content and maximum religious content.

24           JUSTICE GINSBURG: Mr. Chemerinsky, on  
25 that point, how much of the Ten Commandments -- I

1 mean, once we get to thou shalt not kill or murder,  
2 then there are tenets to govern a society, but how  
3 much are strictly about the obligation that man owes  
4 to God?

5 MR. CHEMERINSKY: The first of the two  
6 tablets, the first five commandments, Your Honor, and  
7 of course religions belief this was written in God's  
8 own hand and given to Moses. It's believed that the  
9 first five commandments that you were referring to  
10 are God's prescriptions for religious behavior.

11 The latter five, the others that you're  
12 referring to, were God's commands for secular  
13 behavior. All of these are God's commands to God's  
14 people. And that's what makes a difference than the  
15 minimal religious content of God save this Honorable  
16 Court that Justice Scalia was referring to.

17 The core of Texas's argument seems to be  
18 that it's there for secular purposes. But of course,  
19 if one looks at this monument, one sees that it's  
20 emphasizing the religious content and there is  
21 nothing that would lend the reasonable observer to  
22 see the secular content.

23 It says in large letters, I am the Lord,  
24 thy God.

25 JUSTICE GINSBURG: Well, suppose, Mr.

1 Chemerinsky, it was like Moses on that frieze where  
2 there are commandments showing, but there are only  
3 the sixth through tenth commandment. Would that be  
4 all right?

5 MR. CHEMERINSKY: Your Honor, if it was  
6 Moses on that frieze together with fourteen other  
7 symbols, absolutely okay, because it would clear to  
8 the reasonable observer --

9 JUSTICE GINSBURG: But if we just had the  
10 Moses with the tablet that has the instructions for  
11 how people will conduct themselves in a civilized  
12 society versus worshipping.

13 MR. CHEMERINSKY: I think that would still  
14 be unconstitutional between the Texas State Capitol  
15 and the Texas Supreme Court because it would still be  
16 the State of Texas expressing the message that there  
17 is a God and that God has dictated these rules for  
18 behavior.

19 JUSTICE SOUTER: Okay, what if you go one  
20 step further and there was simply a tablet without  
21 any embellishment about source saying, you know, thou  
22 shalt not kill, thou shalt not covet, et cetera,  
23 basically just the last five commandments, pure and  
24 simple. Would you have any objection on  
25 Establishment Clause grounds?

1                   MR. CHEMERINSKY: If the tablets were by  
2 themselves in that way, between the Texas Supreme  
3 Court and the Texas State Capitol, it would be a  
4 harder case, but I believe it would still be  
5 unconstitutional because those tablets do convey a  
6 message that God --

7                   JUSTICE SOUTER: No, I'm just talking  
8 about when I -- I don't know if I used the word  
9 tablet. I'm just talking about a piece of stone or a  
10 poster that says thou shalt not kill, thou shalt not  
11 covet, thou shalt not bear false witness, et cetera.

12                   Would there be any Establishment Clause  
13 objection simply because that does not say so, those  
14 were quotations from the last six commandments.

15                   MR. CHEMERINSKY: No, Your Honor. If all  
16 it said was thou shalt not kill and thou shalt not  
17 steal, I don't think that that would be a problem  
18 because those are a reflection of law.

19                   JUSTICE SCALIA: Who are you kidding? I  
20 mean, everybody knows that comes from the Ten  
21 Commandments. And what that message says is that  
22 these commands that are engraved on the human heart  
23 come from God. Why put it that way? You know,  
24 instead of that, just quote the State statute against  
25 murder. That's not what they're doing.

1           They're saying these basic principles of  
2 human behavior that we're governed by come from God.  
3 And that message would be conveyed so long as you use  
4 the terminology of the Ten Commandments. That's what  
5 the Ten Commandments stand for.

6           MR. CHEMERINSKY: But Your Honor, this  
7 Court has emphasized that content and context matter  
8 enormously. And what I'm trying to do is to  
9 distinguish the situation where in Texas, it was  
10 clearly tablets with the words, I am the Lord, thy  
11 God, with five commandments for religious behavior  
12 and five for secular behavior.

13           From Justice Souter's question, there are  
14 five others and especially those that are reflected  
15 in State law, like thou shalt not kill and thou shalt  
16 not steal. I think that the message is different  
17 there. It is the words, I am the Lord, thy God.

18           JUSTICE KENNEDY: I think you're telling  
19 us the State cannot accommodate religion. The only  
20 way they can do it is to put the Ten Commandments up  
21 and insist that it's always secular, whether it's  
22 predominantly for a secular purpose. It seems to me  
23 that's hypocritical and it's asking religious people  
24 to surrender their beliefs and that is not  
25 accommodation.



1 MR. CHEMERINSKY: No, Your Honor. I do  
2 think that it degrades religion to have to have the  
3 Ten Commandments defended for their secular purpose.  
4 I do think, though, that what's required of the  
5 government, when it puts religious symbols on  
6 government property, is to not be endorsing religion.  
7 That's why a nativity scene by itself in the County  
8 of Allegheny case was unconstitutional.

9 On the other hand, that's why the nativity  
10 scene as part of a unified display in Lynch v.  
11 Donnelly was permissible. That's why, if the Ten  
12 Commandments are part of an overall display like this  
13 frieze, it's permissible. As part of an overall  
14 display about religious tolerance, and that's what  
15 the reasonable observer would see, it is permissible.

16 But where it is the Ten Commandments  
17 themselves, placed as they are here, then it really  
18 is about the government endorsing religion, then it  
19 is the purpose of advancing religion and then it does  
20 violate the Establishment Clause.

21 JUSTICE KENNEDY: So the word accommodate  
22 should not be within our jurisprudence?

23 MR. CHEMERINSKY: Accommodate should very  
24 much be in the jurisprudence. And any time there is  
25 a Free Exercise Clause claim, then there has to be

1 careful attention to accommodating religion. But  
2 there is no Free Exercise Clause claim in this case,  
3 Your Honor, so this isn't a case about accommodating  
4 anybody's religious beliefs. This is about the State  
5 expressing support for religion with sacred and  
6 solemn religious texts on government property. And  
7 my position is --

8 JUSTICE SCALIA: Can the State express its  
9 support for religion generally?

10 MR. CHEMERINSKY: Your Honor, it  
11 all depends --

12 JUSTICE SCALIA: Suppose it didn't have  
13 the Ten Commandments, it just had a big thing that  
14 says religion is good. It said religion is the  
15 foundation of our institutions. Suppose there were  
16 something like that. Would that be bad?

17 MR. CHEMERINSKY: I don't think that would  
18 be a problem under the Establishment Clause because  
19 it's minimal --

20 JUSTICE SCALIA: But there are atheists  
21 who disagree with that intensely.

22 MR. CHEMERINSKY: But Your Honor, I'm not  
23 arguing for a heckler's veto by atheists. What I am  
24 saying is that when the government puts sacred and  
25 solemn texts taken directly from the Bible at the

1 core of its State government, it has to then do  
2 something to convey the message that it's not there  
3 for religious purposes, that it's there for secular  
4 purposes.

5 JUSTICE SCALIA: Doesn't it matter whether  
6 that text has acquired an independent meaning of its  
7 own? As I say, I don't think most people know what  
8 the text of the Ten Commandments are, but they do  
9 know that it stands for the fact that our laws are  
10 derived from God. That's what it stands for. Why  
11 isn't that symbolism sufficient to enable the State  
12 of Texas to use it?

13 MR. CHEMERINSKY: The Ten Commandments  
14 monument by itself conveys the message that the Ten  
15 Commandments are the source of law and it's that  
16 message the State can't convey. May I save the rest  
17 of the time for rebuttal?

18 JUSTICE STEVENS: Yes, you may save your  
19 time.

20 MR. CHEMERINSKY: Thank you.

21 JUSTICE STEVENS: General Abbott, we'll  
22 hear for you, please.

23 ORAL ARGUMENT BY GENERAL GREG ABBOTT

24 ON BEHALF OF RESPONDENTS

25 GEN. ABBOTT: Justice Stevens, and may it

1 please the Court:

2 Every court that has reviewed the specific  
3 facts of this case has agreed that the Texas monument  
4 is constitutional under this Court's well settled  
5 precedents in Lynch and Allegheny. This Court should  
6 agree that the Texas monument should not be torn down  
7 from its historical place for three reasons.

8 First, the Ten Commandments is an  
9 historically recognized symbol of law. Second, this  
10 monument is one of the smallest of the 17 monuments  
11 on the Capitol grounds, and like most of the other  
12 monuments, was a gift to the State of Texas and is  
13 clearly recognized as such on the monument itself.

14 And third, this monument has stood for  
15 more than 40 years without controversy on a national  
16 historic landmark. In fact, even the --

17 JUSTICE STEVENS: May I ask you this  
18 question? Under your analysis of the reason this is  
19 justifiable. Would it equally be permissible to have  
20 a crucifix of the same size in the same location on  
21 the Capitol grounds?

22 GEN. ABBOTT: Justice Stevens, I think  
23 that would pose a much greater problem.

24 JUSTICE STEVENS: That's not my question.  
25 Do you think it would be permissible -- it seems to

1 me your reasoning that you've given us would support  
2 that result. And maybe that's the correct result.  
3 I'm wondering what your view is.

4 GEN. ABBOTT: I seriously question whether  
5 or not a crucifix would be constitutionally  
6 acceptable in that same location, and for the very  
7 same reasons which I'm articulating why the Ten  
8 Commandments would be acceptable in this location.

9 The crucifix is not like the Ten  
10 Commandments in that it's not an historically  
11 recognized symbol of law. It doesn't send a secular  
12 message to all the people, regardless of whether they  
13 are believers or not believers of the important role  
14 the Ten Commandments have played in the development  
15 of law.

16 JUSTICE SCALIA: It's not a secular  
17 message. I mean, if you're watering it down to say  
18 that the only reason it's okay is it sends nothing  
19 but a secular message, I can't agree with you. I  
20 think the message it sends is that law is -- and our  
21 institutions come from God.

22 And if you don't think it conveys that  
23 message, I just think you're kidding yourself.

24 GEN. ABBOTT: Well, Justice Scalia, the  
25 Ten Commandments send both a religious message and a

1 secular message. When people --

2 JUSTICE O'CONNOR: But the district court,  
3 I think in this very case, found that commemorating  
4 the Ten Commandments' role in the development of  
5 secular law was not one of the State's purposes in  
6 accepting the monument.

7 Now, will you accept that finding as the  
8 case comes to us? That hasn't been challenged. We  
9 don't have any cross appeal. I assume we accept that  
10 finding of the district court.

11 GEN. ABBOTT: The Court obviously is  
12 correct to accept that finding. As you know, from  
13 the district court's finding, the secular purpose  
14 that was accepted by the district court was to honor  
15 the Paternal Order of Eagles. But also there was an  
16 ongoing --

17 JUSTICE O'CONNOR: But you're arguing for  
18 something contrary to the district court's finding.

19 GEN. ABBOTT: I'm actually, Justice  
20 O'Connor, arguing for purposes that are in addition  
21 to that district court's finding because there was an  
22 ongoing purpose to retain this now historical  
23 monument that has stood for more than 40 years  
24 without controversy on a national and historic  
25 landmark.

1 JUSTICE KENNEDY: So in another case, if a  
2 government official feels that the Ten Commandments  
3 have been very, very important in his or her life as  
4 a spiritual or religious matter and wants other  
5 people to know how important the Ten Commandments  
6 are, he cannot accept on behalf of the city the Ten  
7 Commandments. And so you can have no Ten  
8 Commandments in city A with the Ten Commandments in  
9 city B. General, that doesn't make a lot of sense to  
10 me.

11 And again, you're just doing with purpose  
12 what you did in response to Justice Scalia's  
13 question. You're asking us to ignore the religious  
14 purpose that is the most manifest value of these  
15 symbols.

16 GEN. ABBOTT: Well, with regard to both  
17 purpose and effect in this particular setting, I  
18 don't think that religion was the driving force. I  
19 know that all of the evidence shows that religion was  
20 not a driving force in any respect.

21 JUSTICE O'CONNOR: I suppose that every  
22 monument that's on the State Capitol grounds in Texas  
23 in a sense conveys a message of State endorsement,  
24 State endorsement of the role of servicemen in  
25 fighting earlier wars or in support of the Boy Scouts

1 or whatever it might be, doesn't it?

2 I mean, by placing them there with the  
3 legislative approval, is that not really some kind of  
4 a message of endorsement for each one?

5 GEN. ABBOTT: If I may clarify an  
6 important fact and that is clearly the state of  
7 Texas, by displaying 17 monuments in a museum-like  
8 setting on Capitol grounds, is trying to acknowledge  
9 and commemorate certain events.

10 It's important for the Court to remember,  
11 though, that the State of Texas has specifically  
12 endorsed nine of those monuments by putting the State  
13 seal or the Lone Star seal for the State of Texas on  
14 those nine monuments. This monument does not have  
15 that kind of endorsement on there.

16 JUSTICE SOUTER: Isn't it all the case, as  
17 has been pointed out, that no monument is going to be  
18 on the grounds of the Texas State Capitol without the  
19 approval of the legislature? You don't dispute that,  
20 do you?

21 GEN. ABBOTT: Not at all. That is very  
22 true.

23 JUSTICE SOUTER: And you don't dispute  
24 that anyone going on those grounds would assume that  
25 the State government approved it or it wouldn't be



1     there?

2                   GEN. ABBOTT:   Justice Souter, of course  
3     the presumption would be that people on the Capitol  
4     grounds would assume the State of Texas wanted those  
5     monuments on the Capitol grounds.

6                   JUSTICE KENNEDY:   Well, I'm not sure that  
7     that endorsement -- in England, there is a square  
8     where they have King Charles on one hand -- on one  
9     end and he's looking at Oliver Cromwell, who beheaded  
10    him, on the other.   I don't know if you have to  
11    endorse one or the other.

12                  GEN. ABBOTT:   Well, Justice Kennedy, I  
13    believe that there is a very meaningful difference  
14    between this Court's standards of an endorsement and  
15    what a State or the nation may do with regard to  
16    commemoration.

17                  As an easy example, on the National Mall,  
18    there is, of course, the Lincoln Memorial and in the  
19    Lincoln Memorial, there is text from the King James  
20    version of the Bible.   The nation commemorates and  
21    acknowledges Lincoln and what he has said.   But by  
22    that display, the United States is not trying to  
23    endorse the King James version of the Bible or a  
24    particular religious message in that.   Instead what  
25    the state --

1 JUSTICE SOUTER: But you have to contend  
2 with the fact that the district court found that this  
3 sort of commemoration of the commandments involved  
4 was not the objective in placing the monument there,  
5 so you're left basically with a religious text.

6 And if anybody has any doubt about that,  
7 the religious text is surrounded by some religious  
8 symbols, the Chi Rho, the Star of David. So it seems  
9 to me that it's hard to find, if we accept the  
10 district court findings, that there's anything here  
11 but an expression of approval by the State of Texas  
12 for a religious expression, and only for the  
13 religious expression.

14 GEN. ABBOTT: All other factors, though,  
15 Justice Souter, as a person who stands in front of  
16 that monument clearly recognizes, centered in a  
17 specialized scroll is an indication that this was a  
18 monument that was dedicated and presented to the  
19 people and the youth of the State of Texas by the  
20 Fraternal Order of Eagles. There is no stamp of  
21 approval on this by the State of Texas on that  
22 monument.

23 JUSTICE SOUTER: But you're not trying to  
24 withdraw the -- I took it to be the concession that  
25 of course anyone would reasonably assume that the

1 State of Texas approved this message, and thought it  
2 was appropriate to devote state property to its  
3 promulgation.

4 GEN. ABBOTT: Clearly the State of Texas  
5 approved the monument being on the grounds --

6 JUSTICE SOUTER: But then the fact that  
7 the Eagles also approve it doesn't really get us very  
8 far, does it?

9 GEN. ABBOTT: Well, where I believe it  
10 gets you, as this Court has recognized, there is a  
11 very meaningful difference between acknowledging  
12 something and endorsing something. For example, the  
13 creche in Lynch or the menorah in Allegheny.

14 JUSTICE SOUTER: Let me ask you this. If  
15 the Eagles' presentation statement weren't on there,  
16 would that make a difference to Establishment Clause  
17 analysis?

18 GEN. ABBOTT: I think the Eagles'  
19 disclaimer on there helps our case but if it were not  
20 on there, I think the monument could still stand just  
21 as the creche did in Lynch or the menorah in  
22 Allegheny. The city of Pawtucket was not endorsing  
23 the creche in the display, it was acknowledged as  
24 part of the overall holiday celebration.

25 JUSTICE SOUTER: What is the -- that's one

1 of the problems with the argument, it seems to me,  
2 that by putting the Ten Commandments monument on  
3 grounds that have lots of other monuments, that the  
4 religious message is somehow either diluted or  
5 changed. Contrast the situation in Texas with what  
6 we've got here.

7           You've got Moses up there with at least  
8 the last five commandments showing. But Moses is in  
9 the company of a group of individuals who are nothing  
10 but law givers. You've got Menes and Hammurabi and  
11 John Marshall and the rest of them. There is an  
12 obvious theme.

13           Anybody who looks at the identity -- or  
14 knows the identity of these figures is saying they're  
15 getting at law givers. But if you look at the  
16 grounds of the Texas State Capitol, you see wars,  
17 pioneer women, children and so on. There is no one  
18 common theme. The only theme seems to be these are  
19 objects or symbols that are worthy of some kind of  
20 respect.

21           And one of them is religious. Being mixed  
22 into a group that has no common theme does not  
23 eliminate the religious -- the obvious religious  
24 message from this monument. Isn't that correct?

25           GEN. ABBOTT: Well, just as this Court may

1 display in the courtroom itself, Moses with the Ten  
2 Commandments amongst law givers, doesn't mean that  
3 that is the only way the Ten Commandments --

4 JUSTICE SOUTER: Maybe it doesn't, but I'm  
5 trying to find a rationale for the argument that's  
6 being made, and that I thought you were alluding to.

7 The argument is that by mixing this in  
8 with a grab bag of other symbols, you have somehow  
9 diluted or changed the focus from a religious message  
10 to something else. And I can understand that in the  
11 Moses case in the frieze because there is a clear  
12 common theme.

13 On the Texas grounds, at least insofar as  
14 I can tell, there is no common theme. There are a  
15 series of objects that say, these are worthy of  
16 veneration. One of them is religious. There is  
17 nothing that removes the religious message from its  
18 prominence in the display the way the religious  
19 message is removed from prominence in the Moses  
20 display, isn't that correct?

21 GEN. ABBOTT: Your Honor, if I may explain  
22 with two points. One, there is a common theme on the  
23 Texas Capitol grounds, just as there are on most  
24 Capitol grounds and on the National Mall. And the  
25 common theme is to recognize historical influences in

1 our country and in our State.

2 JUSTICE SOUTER: But what do you do with  
3 the district court finding?

4 GEN. ABBOTT: Well, the district court  
5 finding obviously chose to decide that the secular  
6 purpose for the display was to honor the Fraternal  
7 Order of Eagles for their commitment to combatting  
8 juvenile delinquency.

9 But that is different -- the purpose why  
10 the district court found why the display was  
11 constitutional is different than the message that is  
12 being sent to the reasonable observer.

13 JUSTICE SOUTER: You had a second point  
14 and I don't want to miss your second point.

15 GEN. ABBOTT: The second point is that  
16 there are other displays in this Court. As a person  
17 walks into this courtroom or exits the courtroom,  
18 they don't see the Ten Commandments in a display with  
19 a bunch of law givers. Instead, they see the Ten  
20 Commandments alone with an eagle above it.

21 JUSTICE GINSBURG: They see blank tablets.  
22 They don't see any writing. This is the only one  
23 that has script on it. It has numbers and in fact  
24 that's confusing because one of them, the people  
25 think is the Ten Commandments is the Bill of Rights.

1 (Laughter.)

2 GEN. ABBOTT: Justice Ginsburg, clearly  
3 the Ten Commandments that are reflected on the  
4 doorway into and out of this courtroom don't have  
5 words on them like the tablets do in the State of  
6 Texas.

7 JUSTICE SCALIA: But we know what they  
8 are, don't we?

9 GEN. ABBOTT: We do and that's the point.  
10 Even more importantly, the reasonable observer knows  
11 what --

12 JUSTICE STEVENS: But do we know which  
13 version of the Ten Commandments it stands for? There  
14 are three different versions at least.

15 GEN. ABBOTT: I happen to agree with the  
16 Petitioner. There is more than three versions of the  
17 Ten Commandments. And the purpose, if you go back to  
18 what the Eagles were trying to achieve here, was to  
19 come up with a version of the Ten Commandments that  
20 wasn't reflective of any particular religion.

21 JUSTICE SCALIA: And it doesn't matter  
22 what the version is, does it? If it just stands for  
23 the fact that laws -- the foundation of our laws is  
24 God. If that's all it stands for, who cares what the  
25 text is.

1 JUSTICE STEVENS: General Abbott, would  
2 the Texas purpose be equally served if the monument  
3 had on it the kind of disclaimer that the city in  
4 Wisconsin put on its monument?

5 GEN. ABBOTT: Justice Stevens, I  
6 apologize, I'm not familiar with that disclaimer.

7 JUSTICE STEVENS: It reads this way. What  
8 they did is they sold the parcel of land that had the  
9 Eagles' donation on it back to the Eagles and then  
10 they put a fence around it and then they put this  
11 sign up, "This property is not owned or maintained by  
12 the City of Lacrosse, nor does the City endorse the  
13 religious expression thereon." Maybe as long as it's  
14 still on the property, it couldn't be the same.

15 But suppose you had a comparable  
16 disclaimer. Would that defeat any of the purposes on  
17 which you relied to justify having the statue there?

18 GEN. ABBOTT: A disclaimer like that would  
19 surely ensure that this display is constitutional.  
20 However, it's our contention --

21 JUSTICE STEVENS: And would it undermine  
22 the message that you legitimately seek to convey?

23 GEN. ABBOTT: I don't believe it would.

24 JUSTICE SCALIA: Why don't you do it and  
25 we wouldn't have this case? I really would consider



1 it something of a Pyrrhic victory if you win on the  
2 ground that you're arguing. So that in all future  
3 cases, we're going to have to examine displays of the  
4 Ten Commandments to see whether there was ever any  
5 intent to say that our laws are ultimately dependent  
6 upon God. Is that what you want us to do case by  
7 case?

8 GEN. ABBOTT: Well, this Court obviously  
9 has decided Establishment Clause cases on a  
10 case-by-case basis, but in this particular instance,  
11 the Ten Commandments displayed in a museum-like  
12 setting on the Capitol grounds arrayed among 17 other  
13 monuments, the message that is received by the viewer  
14 who is trekking through the Capitol grounds looking  
15 at monuments is clearly one not of the State of  
16 Texas.

17 JUSTICE BREYER: I've got to get one  
18 question before you leave because you're the one who  
19 knows the record. And what I've had a hard time  
20 finding in the record is what I think there must be  
21 some material that the State or somebody in a tourist  
22 office or a guide or somebody tells people what the  
23 17 different monuments are.

24 And all I've found is the general brochure  
25 which doesn't tell them what they are. And I found

1 something on the Internet. Well, which is in the  
2 record. But aside from this page from the Internet  
3 in the record and that, is there anything else in  
4 this record that if somebody wanders around, they're  
5 on the State grounds, they say, what is this, what  
6 are these things anyway? There must be something to  
7 tells them. And where is it?

8 GEN. ABBOTT: The state provides a walking  
9 tour guide.

10 JUSTICE BREYER: And the brochure doesn't  
11 tell what they are. This thing, it says grounds?

12 GEN. ABBOTT: Your Honor, Justice Breyer,  
13 if I could refer you to page 205 of the joint  
14 appendix, it provides a description of each of the  
15 monuments on the walking tour. And if I could also  
16 refer the Court to page 117 of the joint appendix, it  
17 shows the actual walking tour where a person would go  
18 along the process of seeing the monuments.

19 But clearly as they walk through the  
20 Capitol grounds, what any observer, not just the  
21 reasonable observer, what any observer would notice  
22 is that before they could even get to this particular  
23 monument, they will have passed in full view of  
24 countless other monuments and historical markers  
25 clearly indicating to them that they are not there

1 for the purpose of seeing just the Ten Commandments  
2 but they are in a museum-like setting cast among many  
3 different kinds of monuments.

4 And so they appreciate the setting before  
5 they even arrive at the Ten Commandments monument.

6 Also when they arrive at the Ten  
7 Commandments monument, they will notice it is one of  
8 the smallest of the monuments on the Texas Capitol  
9 grounds. It does have the disclaimer on it  
10 indicating that it was donated by the Fraternal Order  
11 of Eagles. It does not have the State seal on it  
12 like many of the other monuments, so it's not --

13 JUSTICE GINSBURG: Is it like how many  
14 other monuments? This is not peculiar to Texas. The  
15 Order of the Eagles have given how many monuments  
16 just like this one, identical to this one?

17 GEN. ABBOTT: Justice Ginsburg, it is  
18 actually not clear from the record. There have been  
19 some accounts of hundreds, maybe even into the  
20 thousands that the Fraternal Order of Eagles have  
21 given out. And I cannot tell you for a fact that  
22 they are all identical.

23 JUSTICE GINSBURG: When you said that  
24 every court that has considered this case has said  
25 it's compatible with the Establishment Clause, did

1     you mean just this Texas case or other cases  
2     involving an Eagles Ten Commandments?

3             GEN. ABBOTT: Justice Ginsburg, my  
4     reference was to the fact that every case that has  
5     considered the specific -- every court that has  
6     considered the specific facts of this case, meaning  
7     the Texas case --

8             JUSTICE GINSBURG: So you didn't mean this  
9     particular depiction of the Ten Commandments?

10            GEN. ABBOTT: No, Your Honor. What I  
11     meant is that both the district court and the Fifth  
12     Circuit Court of Appeals specifically reviewed the  
13     facts of this case and were all in complete agreement  
14     that the facts of this case render this monument  
15     constitutional under this Court's well settled  
16     precedents in Lynch and Allegheny.

17            One other thing I would like to draw the  
18     Court's attention to that will give you a very well  
19     understanding of what the monument looks like and its  
20     setting is the videotape that is Exhibit 44, it's  
21     obviously not part of the joint appendix, but it  
22     demonstrates how this particular monument is set in a  
23     museum-like setting amongst many other monuments and  
24     gives you the perspective of what the typical viewer  
25     would appreciate as they walk around the Capitol

1 grounds.

2 JUSTICE GINSBURG: Kind of an eclectic  
3 museum. One message that you get is that the State  
4 is honoring the donor of the various --

5 JUSTICE STEVENS: General Abbott, I want  
6 to thank you for your argument and also for  
7 demonstrating that it's not necessary to stand at the  
8 lectern in order to a fine job. Thank you.

9 GEN. ABBOTT: Thank you, Your Honor.

10 JUSTICE STEVENS: Mr. Clement.

11 ORAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE UNITED STATES

13 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

14 MR. CLEMENT: Justice Stevens, and may it  
15 please the Court:

16 The Ten Commandments have undeniable  
17 religious significance, but they also have secular  
18 significance as a code of law and as a  
19 well-recognized historical symbol of the law. When a  
20 State decides to display a Ten Commandments display  
21 along with more than a dozen other monuments on its  
22 Capitol grounds in order to honor the donor, it is  
23 not endorsing the religious text of the Ten  
24 Commandments.

25 And in the same way, when a state has that

1 monument as part of such a collection, the  
2 Establishment Clause should not be interpreted to  
3 force them to send a message of hostility to religion  
4 by singling out that one monument for removal solely  
5 because of its religious content.

6 JUSTICE STEVENS: Can I ask you to address  
7 one thing that troubles me about the case? As I  
8 understand it, it's the Protestant version basically  
9 of the Ten Commandments we have before us, which has  
10 significant differences from the Catholic version and  
11 the Jewish version.

12 And I understand it was the result of  
13 consultation and so forth. But I noticed in your  
14 brief, you list the States in which the Ten  
15 Commandments displays are listed, there is none for  
16 Rhode Island, which I often think of as primarily a  
17 Catholic state, and the only one from Massachusetts  
18 is a frieze on the north wall of the public library  
19 which apparently didn't have the text of the  
20 commandments in it.

21 Is there any significance to the fact that  
22 this kind of display may be more popular in areas of  
23 the country where the Protestant religion is dominant  
24 as opposed to other versions of Christian religions?

25 MR. CLEMENT: Justice Stevens, I don't

1 think so. I mean, we didn't purport to do an  
2 exhaustive survey, but I think there is a  
3 well-represented group of displays throughout the  
4 country including, I think, in States that probably  
5 have relatively high Catholic populations.

6 But I think we would steer this Court away  
7 from attributing too much significance to the fact  
8 that if a State is going to display the Ten  
9 Commandments at all, it will necessarily have to  
10 display a version that reflects one or another sect's  
11 preferences.

12 In the Marsh case, for example, this Court  
13 upheld legislative prayer. It understood that they  
14 would necessarily have to choose a chaplain and that  
15 chaplain would necessarily be of one denomination or  
16 another. And this Court didn't doom the whole  
17 practice of legislative prayer because of the  
18 necessity of picking a chaplain of one denomination  
19 or another.

20 In fact, in the Marsh case itself, this  
21 court upheld Nebraska's practice, even though they  
22 had chosen the same Presbyterian minister for 16  
23 straight years. And so I don't think this Court in  
24 other Establishment Clause contexts has steered away  
25 from putting the States and municipalities in a

1 catch-22.

2 And given that this Court has suggested  
3 even in Stone against Graham that the Ten  
4 Commandments can be displayed, can be used in certain  
5 settings, it can't be that once the State in practice  
6 picks a particular version, it's all of a sudden  
7 guilty of a sectarian preference.

8 JUSTICE STEVENS: Of course, the other  
9 thing that's notable about your listing is most of  
10 the examples are examples of displays of the event  
11 itself rather than the text. And there is an  
12 argument made I think by Professor Laycock that when  
13 you display the entire text, it's kind of a different  
14 sort of symbol than when you just have a symbolic  
15 presentation.

16 MR. CLEMENT: Well, Justice Stevens, I  
17 think that quite a few -- both types of displays and  
18 I think the very fact the Fraternal Order of Eagles  
19 put a lot of displays out suggests that a bunch of  
20 them are textual displays.

21 I'm not sure, though, that a display that  
22 actually has Moses receiving the Ten Commandments  
23 from God is any less religious. I would suggest  
24 that's actually more religious than one that just  
25 displays the monument standing alone.



1           If the monuments are standing alone, you  
2   can I think appreciate the fact that maybe they're  
3   being displayed for their secular significance as  
4   well as their religious significance. When Moses is  
5   there, it's hard to avoid the implication that they  
6   are the revealed law of God, as opposed to also a  
7   secular code.

8           So in that sense, I'm not sure that the  
9   variations in the display --

10           JUSTICE STEVENS: A symbolic display is  
11   less objectionable when quoting the text as this  
12   monument does?

13           MR. CLEMENT: Well, Justice Stevens, I  
14   would say -- my point is not that there are not other  
15   ways to display it. Certainly I think, as we point  
16   out in our brief, blank tablets or tablets with Roman  
17   numerals are less objectionable -- certainly, I think  
18   they're beyond objection -- than a textual display.

19           My point was that I'm not quite sure how  
20   one would balance sort of four commandments and Moses  
21   versus all Ten Commandments in text. I think it's a  
22   close call.

23           JUSTICE STEVENS: Well, except the four  
24   commandments and Moses would avoid the differences  
25   between the three different versions of the Ten

1 Commandments, whereas when you quote one, you must  
2 select one over the other two.

3 MR. CLEMENT: Well, I guess I'm not sure  
4 that's true. I mean, some of the displays that are  
5 out there in courthouses have Moses receiving the  
6 commandments and have text. And I guess, my point,  
7 though, would be, again --

8 JUSTICE STEVENS: Most of them don't.

9 MR. CLEMENT: To be sure, to be sure. But  
10 I would hope the constitutional line wouldn't be that  
11 you can't have text. I mean, the Ten Commandments  
12 have a role in our society and had an influence on  
13 the development of the law as text.

14 I mean, they weren't influential with ten  
15 Roman numbers. They were influential as text.

16 JUSTICE GINSBURG: General Clement, there  
17 is a question I have about the government's position.  
18 And does place matter at all? I mean, here we're  
19 talking about the grounds surrounding a State  
20 Capitol. What about every school room, if that's the  
21 choice of the school board? Is it the same or do you  
22 make -- or every courtroom up to the court to decide  
23 for itself?

24 MR. CLEMENT: Justice Ginsburg, I  
25 certainly think location and context matters. I

1 think in almost every Establishment Clause context,  
2 the setting and context matters a great deal. The  
3 school case, for example, as you suggest, I mean,  
4 unless this Court is going to revisit Stone against  
5 Graham, it's certainly true that the school context  
6 at least raises much more difficult questions.

7 In terms of where it can be displayed in  
8 the courthouse, I think there are certainly  
9 permissible displays in the courthouse, but it may be  
10 something all together different to have a display in  
11 a way that it actually looks like a religious  
12 sanctuary within the walls of the courthouse.

13 JUSTICE GINSBURG: It looks just like this  
14 monument. Let's take this monument and put it in the  
15 rotunda of the court because the judges of that court  
16 choose to have it there. Is that all right?

17 MR. CLEMENT: Justice Ginsburg, I think  
18 putting it in the rotunda of the court as a  
19 stand-alone monument, giving it sort of pride of  
20 place, if you will, raises a much more difficult  
21 question, to be sure, and may well cross the  
22 constitutional line.

23 As I was alluding to, the one case I'm  
24 familiar with, which is the case of the Alabama  
25 Supreme Court, there it was displayed in a way that

1 the district court literally found it was like a  
2 religious sanctuary within the walls of the court.

3 JUSTICE KENNEDY: And do you think that it  
4 should cross the constitutional line under the  
5 interpretational theory of the First Amendment you  
6 wish us to adopt?

7 MR. CLEMENT: I think the display that I  
8 have in mind in the Alabama Supreme Court probably  
9 does cross the constitutional line even under our  
10 view. I think that a display of the Ten Commandments  
11 in some appropriate way in the courthouse certainly  
12 wouldn't cross the line that this Court -- that we  
13 would have this Court draw.

14 I mean, we think, for example, it cannot  
15 be that the very fact that moving it closer to the  
16 courthouse itself is a constitutional problem because  
17 as you yourself have pointed out, Justice Kennedy,  
18 the legislative prayers that were approved in Marsh  
19 v. Chambers were at the absolute epicenter of the  
20 government. And still those were a permissible  
21 acknowledgment of religion.

22 So I think while context matters, I don't  
23 think solely the fact that it's moved closer to the  
24 seat of government does have a dispositive impact.

25 And again, I would say in response to

1 Justice Stevens' question, I do think it is important  
2 to remember that there is going to have to be a  
3 choice among the various documents if they are going  
4 to be displayed at all. And I don't think that the  
5 Constitution puts the municipalities and the States  
6 in the bind of being able to display the Ten  
7 Commandments in theory, but in fact, not being able  
8 to pick any one version --

9 JUSTICE STEVENS: What would your comment  
10 be on requiring a disclaimer of some kind?

11 MR. CLEMENT: Well, Justice Stevens, two  
12 points to make about that. One is certainly a  
13 disclaimer would make this an easier case. And I  
14 would point out that there is a disclaimer of sorts  
15 on the monument already because it clearly states  
16 that it was a gift from the Fraternal Order of  
17 Eagles.

18 JUSTICE STEVENS: It is kind of ambiguous.

19 MR. CLEMENT: It is, Justice Stevens, and  
20 I'm troubled frankly by the suggestion that they  
21 would have to go as far as you suggested they would  
22 go under the City of Lacrosse case. The idea that in  
23 order to have the Ten Commandments monument on the  
24 Capitol grounds, the State of Texas has to cordon  
25 that monument off, unlike any other of the 17

1 monuments, suggests a hostility to religion.

2 I think the idea that there has to be a  
3 fence away from the Ten Commandments to make clear  
4 that the State has nothing to do with the Ten  
5 Commandments is bending over too far in the other  
6 direction. The State can have, as this Court has  
7 acknowledged many times, permissible acknowledgments  
8 of religion. And I don't think in this case that the  
9 State of Texas has gone too far.

10 One other point I think that is important  
11 to put on the table, and it is consistent with the  
12 analysis of both the district court and the Fifth  
13 Circuit, is that whatever the original purpose is for  
14 Texas accepting the monument and displaying it in the  
15 first instance, they now have an additional secular  
16 purpose in retaining the monument.

17 And I would point this Court to Judge  
18 Becker's analysis in the Chester County case for the  
19 Third Circuit. In that case, he had a display that  
20 was admittedly smaller, but it was actually a much  
21 more overtly sectarian version of the Ten  
22 Commandments. It had the Ten Commandments plus the  
23 summary of the Ten Commandments from the New  
24 Testament.

25 And nonetheless, Judge Becker said that in

1 that case, the monument had been there since 1920 and  
2 Chester County had a legitimate secular purpose in  
3 maintaining that document and maintaining the plaque  
4 on the courthouse.

5 And I think he correctly understood that  
6 in these cases of displays that have stood for 40  
7 years or longer, that the State is in something of a  
8 dilemma. Thank you, Your Honor.

9 JUSTICE STEVENS: Mr. Chereminsky, you  
10 have four minutes left.

11 REBUTTAL ARGUMENT OF ERWIN CHEREMINSKY  
12 ON BEHALF OF PETITIONER

13 MR. CHEREMINSKY: Thank you. This case  
14 comes down to two questions. First, is the Ten  
15 Commandments a highly religious message. And second,  
16 can the government place a single religious message  
17 on government property at the seat of its government.

18 As to the first question, *Stone v. Graham*  
19 resolves this because this Court said that the Ten  
20 Commandments is an inherently religious message no  
21 matter what disclaimer accompanies it.

22 The Ten Commandments is not on the Texas  
23 State Capitol grounds simply to recognize the role of  
24 religion in government. It is not simply an  
25 acknowledgment. It is sacred text taken directly

1 from the Bible. It's not there about the history of  
2 religion in Texas. There is nothing to tell the  
3 reasonable observer that it is there for historical  
4 purposes.

5 What about all the other religions that  
6 have played a role in Texas history? The Mojave  
7 religion, even Madeleine Murray O'Hare. Is Texas  
8 saying they would accept statues for all of these  
9 individuals there as part of the history of Texas?

10 The second question is, can the government  
11 place a single religious message by itself on  
12 government property, especially at the seat of  
13 government. The County of Allegheny case resolves  
14 that. This is much like the nativity scene at the  
15 seat of the county government.

16 What's important and hasn't gotten enough  
17 emphasis this morning, this is the sole religious  
18 message anywhere on the Texas State Capitol grounds.  
19 This isn't a museum. Every item that's there is  
20 there because the Texas legislature chose to put it  
21 there. Most of them honor veterans of particular  
22 wars. Texas put this there precisely to express the  
23 religious message.

24 Your Honors, what's left of the  
25 Establishment Clause if any item can be displayed



1 with the most profound religious contents? Do we  
2 then say the observer can just avert his or her eyes?  
3 The observer could have averted his or her eyes in  
4 the County of Allegheny case. But this Court was  
5 clear in saying that a single religious message, a  
6 single religious symbol on government property is  
7 inherently an establishment of religion.

8 For this reason, the Texas monument  
9 violates the Establishment Clause. Thank you.

10 JUSTICE STEVENS: Thank you,  
11 Mr. Chereminsky. The case is submitted.

12 (Whereupon, at 11:07 a.m., the  
13 above-entitled case was submitted.)  
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